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No. 91-820

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

LARRY RISK, et al.,
Petitioners,

VS.

THE KINGDOM OF NORWAY,
Respondent.

BRIEF OF KINGDOM OF NORWAY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does this case fall within 28 U.S.C. § 1605(a)(5), the noncommercial tort exception to the foreign sovereign immunity granted by 28 U.S.C. § 1604, assuming, *arguendo*, that:

a. A Norwegian citizen mother took her two minor children, also Norwegian citizens, to Norway from California on July 16, 1984, even though a temporary custody order of the San Francisco Superior Court then prohibited her from removing the children from the San Francisco Bay Area;

b. The Norwegian mother's failure to comply with the custody order violated California Penal Code § 278.5;

c. A Norwegian consular officer stationed in Los Angeles, California, being aware of the custody order and its travel restrictions, issued a Norwegian Seaman's Certificate of Identity to the mother in Los Angeles while she was en route to Norway with her children;

d. Another Norwegian consular officer, stationed in San Francisco, California, being then aware of the custody order and its travel restrictions, had previously suggested that the Norwegian mother return to Norway with her children via Canada?

2. If this case does fall within 28 U.S.C. § 1605(a)(5) by reason of the conduct of the Norwegian consular officers, does respondent Kingdom of Norway ("Norway") nevertheless have foreign sovereign immunity from suit pursuant to 28 U.S.C. § 1605(a)(5)(A), the discretionary function exception to the liability imposed by 28 U.S.C. § 1605(a)(5)?

3. Does Norway have foreign sovereign immunity from suit under 28 U.S.C. § 1604 because petitioner's claims are based in part on alleged acts or omissions of Norwegian officials in Norway?

4. Are petitioner's claims against Norway time-barred by California Code of Civil Procedure § 340(3) because more than one year had elapsed between the alleged occurrence of the acts complained of and the filing of the action in the district court below?

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BRIEF OF KINGDOM OF NORWAY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent, The Kingdom of Norway ("Norway"), opposes the petition of Larry Risk to this Court to issue a writ of certiorari to review a decision of the Court of Appeals for the Ninth Circuit which became final on August 16, 1991, 936 F.2d 393.[1] That decision unanimously affirmed a judgment of the United States District Court for the Northern District of California which dismissed, as against Norway, a complaint for damages against Norway and others filed by petitioner in April, 1988.

STATEMENT OF FACTS[2]

Petitioner's purported Statement of Facts (Petition, pp. 3-6) is misleadingly incomplete. The following additional relevant facts are included in the district court's Memorandum of Decision and Order, 707 F. Supp. 1159 at 1161-62:[3]

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[1]The caption of the petition refers to "Larry Risk, et al., Petitioners." In fact, Mr. Risk is the only petitioner, suing both on his own behalf and as guardian *ad litem* for the Risk children. Accordingly, Mr. Risk is referred to as "petitioner" in this brief.

[2]In this brief, as in the petition, ER refers to the Appellant's Excerpts of Record filed with the court of appeals; SER refers to Appellee's Supplemental Excerpt of Record; CR refers to items included in the district court docket.

[3]The district court's statement was based on its judicial notice of a June, 1987 decision of the Norwegian Supreme Court which upheld the jurisdiction of the City Court of Bergen, Norway, to determine the custody of the Risk children in an action commenced by Elisabeth Risk against Larry Risk in 1985, after her return to Norway with the children. That decision found the facts summarized in the district court's opinion after the presentation of evidence and litigation of the jurisdictional issue by both parties. The decision also held that the Risk children are citizens of both Norway and the United States.

> In July 1983 the Risk family — Larry Risk, Elisabeth Antonsen Risk and their children Karima and Jamil Risk — left the United States to live in Norway for a year. (Norway's Exh. 4, translation of decision of Norwegian Supreme Court, at 1.) Later that year, after an attempt by Larry Risk to take the children back to the United States while Elisabeth Risk was hospitalized, Elisabeth Risk requested and received a temporary custody order from a Norwegian County Court. (*Id.*) That order gave Larry Risk "ordinary visitation rights." (*Id.*) During the first visitation period, Larry Risk took the children and returned with them to the United States. (*Id.* at 1-2.)

The Court of Appeals' decision includes essentially the same statement. (Appendix to Petition, p. 2A; 936 F.2d at 394)

Larry Risk states that he filed this lawsuit only "after exhausting other avenues of relief," presumably to establish contact with his children. (Petition, p. 6.) That is incorrect. After the Norwegian Supreme Court's determination that the Norwegian courts had jurisdiction to decide custody of the Risk children, Mr. Risk did not participate in the custody proceedings that followed in the Norwegian trial court. Despite his failure to do so, Mr. Risk was granted visitation rights on certain conditions. (SER at p. 57.) However, to the best of respondent's knowledge, Mr. Risk has never exercised those visitation rights — nor has he made any of the child support payments ordered by the Norwegian trial court.

The Norwegian Supreme Court decision is included in the SER at pp. 1-11 and its English translation is set forth at pp. 12-22 of the SER. This Court is respectfully requested to take judicial notice of the Norwegian decision pursuant to Rule 201 of the Federal Rules of Evidence.

SUMMARY OF ARGUMENT

The decision of the court of appeals does not warrant review by this Court on writ of certiorari. The decision obviously does not fall within Supreme Court Rule 10.1(a) or (b). Nor, for the following reasons, are there special or important reasons to review the court of appeals' decision of the questions of federal law which it addressed.

First, petitioner lacks clean hands because in 1983 he took the Risk children from Norway to the United States in violation of a temporary custody order issued by a Norwegian court;[4]

Second, the alleged conduct of Norwegian consular officers Halvorsen and Solli in California does not fall within 28 U.S.C. § 1605(a)(5), the noncommercial tort

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[4]Petitioner contends that an Indiana trial court held that the Norwegian court lacked jurisdiction to issue the temporary custody order. (Petition, p. 4.) However, there is no information in the trial court docket respecting court proceedings in Indiana. Petitioner attached an uncertified transcript of an Indiana court proceeding to his reply brief in the court of appeals, which did not take judicial notice thereof.

There is no question that Larry Risk violated a valid Norwegian temporary custody order when he left Norway with the children in 1983. That the Norwegian decree was valid under Norwegian law was conclusively determined by the Norwegian Supreme Court in the litigation between Risk and Mrs. Risk that followed Mrs. Risk's return to Norway with the children. Moreover, under California law a court of general jurisdiction where a child is physically located has jurisdiction to issue temporary custody orders when the welfare of the child is threatened, e.g., through abduction by one of the parents, pendng the court's final determination of jurisdiction. *See People v. Beach,* 194 Cal.App.3d 955, 967-971 (1987); California Civil Code Section 4600.1. In any event, the Indiana decision was superseded by the 1987 Norwegian Supreme Court decision. *Restatement of Judgments, Second,* § 15.

exception to the foreign sovereign immunity granted by 28 U.S.C. § 1604, because their conduct was expressly authorized by the Vienna Convention on Consular Relations, 21 UST 78 *et seq.* ("the Vienna Convention"), of which the United States and Norway are signatories;

Third, the Court of Appeals correctly held that the alleged acts of Norwegian consular officers Halvorsen and Solli in California fall within 28 U.S.C. § 1605(a)(5)(A), the discretionary function exception to the noncommercial tort exception to foreign sovereign immunity;

Fourth, Norway has foreign sovereign immunity if the petition is based on alleged activities of Norwegian officials in Norway, because those elements of the alleged noncommercial tort did not occur in the United States, as required by 28 U.S.C. § 1605(a)(5); and

Fifth, even if the court of appeals erred, the petition should be denied because petitioner's claims against Norway are barred by the applicable statute of limitations, California Code of Civil Procedure § 340(3).

ARGUMENT

A. The Petition For Certiorari Should Be Denied Because Petitioner Lacks Clean Hands

Based on the judicially noticed facts set forth in the decisions of the courts below, it is apparent that petitioner Larry Risk lacks clean hands with respect to the events out of which this petition arises. Larry Risk accuses defendant Elisabeth Risk of having violated California Penal Code Section 278.5 and bases the petition primarily on respondent Norway's alleged complicity therein. But if she is guilty of that crime, so is Larry Risk,

who knowingly violated a Norwegian custody order when he took the Risk children from Norway to California in 1983. California Penal Code Section 279(e) provides that "violation of Section . . . 278.5 is punishable in California, whether the intent to commit the offense is formed within or without the state . . . *if the child thereafter is found in California.*" (Emphasis added)

Larry Risk thus contends that one lawbreaker is entitled to recover damages against the other (and third parties) if the tables are turned in the course of unlawful behavior by both. That contention should be rejected. Of course, two wrongs do not make a right. But both wrongs surely should be considered in determining whether the first wrongdoer is entitled to judicial relief in the courts of the United States. Because Larry Risk does not come to this Court with clean hands, the petition should be denied.[5]

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[5] *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814, 65 S.Ct. 993, 997 (1945) (maxim that he who comes to a court of equity must have clean hands "is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant"); *accord: DeGarmo v. Goldman*, 19 Cal.2d 755, 764 (1942) ("Any unconscientious conduct upon [a plaintiff's] part which is connected with the controversy will repel him from the forum whose very foundation is good conscience").

Under both federal and California law the requirement of clean hands applies to plaintiffs bringing legal as well as equitable actions. *Kuehnert v. Texstar Corporation*, 412 F.2d 700, 704 (5th Cir. 1969) (doctrine of unclean hands applied to claim for damages "since it expresses a general principle equally suited to damage actions."); *F.E.L. Publications v. Catholic Bishop of Chicago*, 506 F. Supp. 1127, 1137 (E.D. Ill. 1981) (same); *Fibreboard Paper Products Corp. v. East Bay Union*, 227 Cal.App.2d 675, 728, 39 Cal.Rptr. 64 (1964).

B. Norway Has Foreign Sovereign Immunity With Respect To Petitioner's Claims That Are Based On The Alleged Conduct In California Of Norwegian Consular Officers Halvorsen And Solli

1. Introduction.

The petition alleges a course of conduct which includes supposed acts and omissions of various defendants in the United States and Norway that extended from January, 1984 to the filing of the complaint in the district court in April, 1988. However, the petition appears to be based primarily on the following events, alleged to have occurred in California between January and July, 1984:

— The issuance of a custody order by the San Francisco Superior Court on January 30, 1984, which prohibited removal of the Risk children from the San Francisco Bay Area.

— The delivery by K. I. Halvorsen, Vice-Consul at the Los Angeles Norwegian Consulate, of a Norwegian Seaman's Certificate of Identity to Elisabeth Risk in Los Angeles while she was returning to Norway with the Risk children on July 16, 1984, when Halvorsen was allegedly aware of the custody order.

— The alleged subsequent denial by Halvorsen to Larry Risk in July, 1984, that Halvorsen had been contacted by Elisabeth Risk or had heard of her.

— The alleged prior suggestion by defendant Olaf Solli, the Norwegian Consul General in San Francisco, to defendant Johans Sandvin, when Solli was allegedly aware of the custody order, that Elisabeth

Risk and the Risk children travel to Norway via Canada.[6]

It is clear that no claim for relief is stated against Norway based on the alleged suggestion of Consul General Olaf Solli to defendant Sandvin because it bore no fruit: Elisabeth Risk did not in fact return to Norway with her children via Canada. It is *not* alleged that Solli played any role whatever in Elisabeth Risk's return to Norway with the Risk children via Los Angeles on July 16, 1984, or even that he knew that it was occurring. It is therefore apparent that petitioner's claims against Norway are based essentially on Vice-Consul Halvorsen's issuance of a Norwegian Seaman's Certificate of Identity to Elisabeth Risk in Los Angeles on July 16, 1984 while she was returning to Norway with the Risk children.[7]

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[6]Petitioners also allege that the provisions of the custody order were disclosed to the Norwegian Foreign Ministry and the Norwegian Justice Ministry in Norway in February, 1984; that a Norwegian Justice Ministry official in Norway thereafter stated, in a telephone conversation with defendant Sandvin, that the best solution for the problem Sandvin had described would be for Elisabeth Risk and the Risk children to travel to Norway; and that Norwegian officials in Norway provided funds for Elisabeth Risk for subsistence, legal fees, and travel expenses. As discussed below (pp. 25-27 infra), the petition should be denied if it is based in part on these alleged activities of Norwegian officials in Norway.

[7]Petitioner repeatedly refers to the Risk children as American citizens. While that is true, they are also Norwegian citizens and nationals under Norwegian Law, as expressly determined by the Norwegian Supreme Court (SER at p. 12). As Norway demonstrated before the district court, the children have Norwegian citizenship because of their mother's Norwegian citizenship. See expert opinion of Professor E. Smith, discussed at CR 43, p. 14 et seq. The United States will accept that nationality because a "genuine link" exists between Norway and the Risk children. Restatement of the Foreign Relations Law of the United States, Third § 211. In the reverse situation, involving children of a mother who is a U.S. citizen married

By reason of the Foreign Sovereign Immunity Act of 1976, petitioner has no claim against Norway based on the alleged conduct of Norwegian consular officers Halvorsen and Solli.

2. The Foreign Sovereign Immunity Act of 1976

Foreign sovereign immunity is given modern-day expression in the United States in the Foreign Sovereign Immunity Act of 1976, 28 U.S.C. §§ 1330, 1602 *et seq.* ("FSIA"). Section 1604 of Title 28, United States Code ("§ 1604"), provides in relevant part:

> . . . . a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in [28 U.S.C. §§ 1605-1607]

United States courts lack both subject matter jurisdiction and personal jurisdiction with respect to an action against a foreign state to which § 1604 is applicable. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 485 fn.5, 103 S.Ct. 1962 (1983).[8]

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to a Norwegian citizen and residing in Norway, the children are U.S. citizens under U.S. law. 8 U.S.C. 1401(g).

[8]The legislative history of the Foreign Sovereign Immunity Act of 1976 and the historical developments prompting its enactment are described in H.R. Rep. No. 1487, 94th Cong. 2d Sess. 7 (1976) ("House Report"), *reprinted in* 31976 U.S. Code Cong. and Ad. News 6604, 6605-6 ("U.S. Code Cong. and Ad. News"). A copy of the House Report is included in the SER at pp. 60-91.

As explicated by this Court in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. at 486-9, the FSIA was enacted primarily because of concern that U.S. citizens would not otherwise have access to U.S. courts to resolve commercial disputes with foreign governmental entities engaged in trade. This problem was seen as particularly acute because of the increasing participation of foreign state enterprises in

a. The Noncommercial Tort Exception To Foreign Sovereign Immunity.

Petitioner seeks to invoke the exception to § 1604 provided by Section 1605(a)(5) of Title 28, United States Code ("§ 1605(a)(5)"), which provides in relevant part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —
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> • • •
>
> (5) . . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to — (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused or (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

Section 1605(a)(5) is commonly referred to as the "noncommercial tort exception" to foreign sovereign immu-

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commercial activities. U.S. Code Cong. and Ad. News, *supra*, at 6605. Congress enacted the FSIA to codify sovereign immunity as then recognized and practiced in international law and to align U.S. practice with that of other nations. *Id.*

nity. Subsections (A) and (B) thereof are referred to as "the exceptions to the noncommercial tort exception."

The principal purpose of the noncommercial tort exception to foreign sovereign immunity is to provide U.S. citizens access to United States courts to sue for injuries incurred in automobile accidents in the United States involving officials, agents or employees of foreign states. *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 587 (9th Cir. 1983); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1525 (D.C. Cir. 1984). The House Report devoted less than one of its 46 pages to § 1605(a)(5), stating simply that "[it] is directed primarily at the problem of traffic accidents but is cast in general terms as applying to all tort actions for money damages, not otherwise encompassed by section 1605(a)(2) relating to commercial activities." U.S. Code Cong. and Ad. News, *supra* at 6619.

The legislative history of the FSIA and cases interpreting the Act make clear that the noncommercial tort exception should be narrowly construed. *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987). See also *Gibbons v. Republic of Ireland*, 532 F. Supp. 668, 671 (D.C. 1982) ("[T]his court must respect the immunity of a foreign sovereign unless some exception to the rule of foreign sovereign immunity is clearly warranted").

b. The Discretionary Function Exception To The Noncommercial Tort Exception.

Subsection (A) of § 1605(a)(5) ("§ 1605(a)(5)(A)") preserves foreign sovereign immunity as to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." The purpose of this

provision is to preserve foreign sovereign immunity for acts involving the exercise of judgment by foreign officials in the course of performing their governmental functions. *Olsen by Sheldon v. Government of Mexico*, 729 F.2d 641, 645 (9th Cir. 1984).

In interpreting the discretionary function exception the federal courts have relied in part on decisions construing the analogous discretionary function exception found in the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* ("FTCA"), 28 U.S.C. § 2680(a), which served as a model for § 1605(a)(5)(A).[9] *Cong. Code and Ad. News, supra* at 6615. The principles which apply to the interpretation of § 2680(a) were set forth by this Court in *Dalehite v. United States*, 346 U.S. 15, 35-36, 73 S.Ct. 956 (1953), as follows:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. *Where there is room for policy judgment and decision there is discretion.* It necessarily follows that acts of

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[9] 28 U.S.C. § 2680(a) provides in relevant part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to —
>
> (a) Any claim based upon an act or omission of an employee of the Government, . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

> subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. (Emphasis added.)

After confirming the continued validity of *Dalehite* in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 104 S.Ct. 2755 (1984) (*"Varig"*) this Court added:

> [I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. As the Court pointed out in *Dalehite,* the exception covers "[n]ot only agencies of government . . . *but all employees exercising discretion.*" [467 U.S. at 813.] (Emphasis added.)

In *Joseph v. Office of Consulate General of Nigeria,* 830 F.2d 1018, 1026 (9th Cir. 1987), a case decided under the Foreign Sovereign Immunity Act, the court adopted the *Varig* principle, saying

> . . . . the court must inquire whether the governmental acts at issue were "grounded in social, economic, and political policy." *Id. In other words, the court should avoid second guessing policy decisions through the medium of a tort action. Id.* The execution of a policy decision by subordinates, even those subordinates at the operational level, comes under the discretionary function exception *if the acts involved the exercise of policy judgment.* (Emphasis added.)[10]

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[10]A distinction between acts on the *planning* level and acts on the *operational* level previously employed by the Ninth Circuit Court of Appeals in FTCA cases has been abandoned as incompatible with *Varig. See, e.g., Joseph v. Office of Consulate General of Nigeria,* 830 F.2d 1018, 1026 (9th Cir. 1987); *Mitchell v. United States,* 787 F.2d

In the instant case the district court wisely noted that while deference to policy decisions of governmental officials is required under both the FTCA and the FSIA, additional foreign policy considerations are implicated when a claim of foreign sovereign immunity is asserted, saying:

> The purpose of the discretionary function exception under the FTCA, like that under the FSIA, is to avoid interference with governmental policymaking. In applying the exception under the FSIA, however, the courts must consider the additional risk of interfering with foreign relations. As a result there is reason to construe the exclusion of criminal acts from the discretionary function exception more narrowly under the FSIA than under the FTCA, and hence give the discretionary function exception wider scope. 707 F.Supp. 1159 at 1166, fnte 10.

3. Because The Functions Performed By Norwegian Consular Officers Halvorsen And Solli Were Authorized By The Vienna Convention On Consular Relations, Their Conduct Was Not Tortious And Norway Therefore Has Foreign Sovereign Immunity.

Under the noncommercial tort exception to foreign sovereign immunity, a foreign state is made liable (subject to specified exceptions) for, *inter alia,* personal injuries "occurring in the United States and caused by the *tortious* act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C.

466, 468 (9th Cir. 1986); *Chamberlin v. Isen,* 779 F.2d 522, 524 (9th Cir. 1985); *Begay v. United States,* 768 F.2d 1059, 1062-63 n.2 (9th Cir. 1985).

§ 1605(a)(5). (Emphasis added.) Petitioner contends that a foreign state may be held liable under 28 U.S.C. § 1605 for the tortious act or omission of a consular officer, even though the officer himself is immune from suit, under the Vienna Convention or otherwise. This contention is questionable.[11] But even if it were true, that would have no application to this case because neither Halvorsen or Solli committed a wrongful, i.e. *tortious,* Act in assisting or advising Elisabeth Risk.

The vicarious liability imposed on foreign nations by 28 U.S.C. § 1605(a)(5) is obviously based on the familiar principle of respondeat superior, pursuant to which an employer is liable *if his employee engages in wrongful conduct vis-a-vis the plaintiff.* There is no basis for the imposition of such vicarious liability on Norway in this case because the alleged conduct of Vice-Consul Halvorsen and Consul General Solli occurred in the course of their performance of consular functions specifically authorized by subsections (d) and (e) of Article 5 of the Vienna Convention. *Those acts were therefore not wrongful, even if inconsistent with California law.*

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[11]Respondent is unaware of any case holding a foreign country liable in tort for the acts of an official who was himself immune from suit. There is nothing in the FSIA or in decisions interpreting the Act which suggests that a foreign state may be held liable for acts of its consular officials which are authorized by the Vienna Convention.

The Vienna Convention governs the rights of each signatory nation to establish and maintain consular representation within the territory of the other signatories. Both the United States and Norway are parties to the Convention. Article 5 of the Convention, entitled "Consular Functions," sets forth in detail the functions which consular officials of the "sending state" are authorized to perform in the "receiving state". Among the consular functions enumerated in Article 5, those defined in subsections 5(d) and (e) apply to the alleged conduct of Messrs. Halvorsen and Solli:

* * *

(d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;

* * *

(e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;

* * *

The foregoing provisions describe only two of a number of consular functions authorized by Article 5 of the Vienna Convention. As to *some* of those activities, whether or not they constitute consular functions is *expressly made contingent* on their not being violative of the law of the receiving state.[12] However, neither subsection (d) nor

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[12]Such activities are permissible only if "there is nothing contrary thereto in the laws and regulations of the receiving State" (Article 5(f)), or the activities are "in accordance with the laws and regulations of the receiving State" (Articles 5(g) and (i)), or "within the limits imposed by the laws and regulations of the receiving State" (Article 5(h)). Other subdivisions require that the

subsection (e) contains similar language respecting the consular functions they define and authorize. As the courts below held and the United States confirmed in its *amicus curiae* brief in a related appeal in the court below, the omission of such qualifying language with respect to those consular functions was not an oversight. *Rather, the Vienna Convention clearly recognizes that those defined functions may be performed by a foreign consular officer whether or not their performance is compatible with the laws of the receiving state in a particular case.*[13]

4. The United States Has Acknowledged That The Functions Performed By Consular Officers Halvorsen And Solli Are Authorized By The Vienna Convention.

The United States filed a brief as *amicus curiae* in appeal No. 88-15803 in the court below, which was taken from the trial court's dismissal of this action as against Halvorsen and Solli.[14] At pages 7-13 thereof, the United States discussed the application of the Vienna Convention

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functions they describe be "compatible with the laws and regulations of the receiving State" (Article 5(j)), or "not prohibited by the laws and regulations of the receiving State" (Article 5(m)).

[13]Petitioner appears to believe that the Vienna Convention is concerned primarily with establishing the existence and scope of consular immunity. That is not the case. Analysis of its provisions shows that the primary purpose of the Convention is to express agreement upon the permissible activities of consular officials of one state in the territory of another state — in other words, to describe the rights of the signatory nations vis-a-vis each other rather than the immunities of their officials. Consular immunity is an adjunct, albeit a necessary one, to that primary purpose.

[14]The Court is respectfully requested to take judicial notice of Part I (pp. 7-16) of the brief of the United States as *amicus curiae* in Appeal No. 88-15803 in the court below.

to the functions performed by Messrs. Halvorsen and Solli in this case.[15] Noting that their conduct involved the consular functions described in subdivisions (d) and (e) of Article 5 of the Vienna Convention, the United States stated:

> . . . U.S. consular officers perform many acts, similar to the ones allegedly performed by defendants Solli and Halvorsen. They issue travel documents and passports for their citizens living abroad and perform all attendant acts which would facilitate departure from a foreign country to the United States. Such acts could include meeting their nationals at the foreign nation's airport or providing them with transportation to such airport. Moreover, U.S. consular officials often give advice concerning travel plans (advice such as that allegedly given by defendant Solli) to their nationals and dependent children for returning to their home country, the United States. *Id.*, pp. 12-13.
>
> • • •
>
> Sovereign states obviously have a strong interest in assisting their nationals and their children in returning home. But if U.S. consular officers could be subjected to intrusive court inquiry merely by a plaintiff's characterization of travel advice as criminal under a foreign state's law, consular immunity would be greatly impaired and the ability of U.S. officers to serve U.S. citizens would be impeded. It is,

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[15] In its *amicus* brief the United States opposed affirmance of the district court's decision insofar as it based the consular immunity of Messrs. Halvorsen and Solli on the Treaty of Friendship Commerce and Consular Rights between the United States and Norway but did not oppose their immunity insofar as it was based on the Vienna Convention.

> in short, the underlying nature of the conduct which should control the question of consular immunity, not a litigant's characterization of that conduct. *Id.*, pp. 13-14.
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> • • •
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> . . . For all the above reasons, plaintiff's suggestion that conduct that can be characterized as criminal automatically falls outside of Article 5(d) [of the Vienna Convention] must fail.

Based on the foregoing statement, the alleged acts of Halvorsen and Solli also fall within subdivision (m) of Article 5 of the Vienna Convention, being consular functions "to which no objection is taken by the [United States]."

5. If The Alleged Conduct of Consular Officers Halvorsen and Solli Does Fall Within 28 U.S.C. § 1605(a)(5), Norway Is Nevertheless Immune From Suit Because Their Conduct Also Falls Within The Discretionary Function Exception to the Noncommercial Tort Exception to Foreign Sovereign Immunity.

The alleged acts of Norwegian consular officers Halvorsen and Solli are that while they were aware of the San Francisco Superior Court custody order and the travel restrictions therein, (1) Vice-Consul Halvorsen issued a Norwegian Seaman's Certificate of Identity to Elisabeth Risk on July 16, 1984, while she was returning to Norway with the Risk children, and subsequently denied to Larry Risk that he had been contacted by Elisabeth Risk or had heard of her and (2) Consul General Solli earlier suggested to defendant Sandvin that Elisabeth Risk and her children travel to Norway via Canada.

Subsection A of § 1605(a)(5) preserves foreign sovereign immunity as to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." The courts below correctly determined that the alleged conduct of Messrs. Halvorsen and Solli falls within § 1605(a)(5)(A).

The complaint alleges that Messrs. Halvorsen and Solli acted within the course and scope of their employment. (Complaint, para. 4, p. 2, lines 8-9.) It is clear both from that allegation and from the conduct complained of that the alleged actions of Halvorsen and Solli were of a public or governmental nature. It is equally clear that *each* of the acts involved a decision by a Norwegian consular officer whether to act or refrain from acting, which necessarily involved the making of one or more policy judgments. Accordingly, as the courts below ruled, the alleged acts of Halvorsen and Solli occurred in the performance of discretionary functions and were based on policy decisions falling within § 1605(a)(5)(A).[16]

Petitioner contends that because Halvorsen and Solli were then allegedly aware of the custody order, they should not have acted as they did. But even if that were true — whether judged by United States or Norwegian law or public policy — Norway nevertheless has foreign sovereign immunity under § 1605(a)(5)(A) which applies "*regardless of whether the discretion be abused.*" (Emphasis added.)

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[16]Petitioner's claim based on Halvorsen's alleged wrongful denial concerning any contact with Elisabeth Risk is also barred by subsection (B) of 28 U.S.C. § 1605(a)(5) because it is one "arising out of . . . misrepresentation [or] deceit . . . ."

The district court's decision that the alleged acts of consular officers Halvorsen and Solli constituted discretionary functions was based on its determination that (1) a sovereign's issuance of travel documents and funds to its citizens, and taking other actions in aid of its citizens' interests, are policy decisions, based on social, legal, and perhaps political considerations, (2) the decision to assist the Mrs. Risk and her children in returning to Norway implements Norway's policies concerning the protection of its citizens, (3) exercising jurisdiction in this case would encroach on Norway's ability to make policy decisions about its nationals and (4) in applying the discretionary function exception a court must consider the risk of interfering with the foreign relations of the United States. (707 F. Supp. at 1166, including footnote 10).

In its decision the court of appeals said:

> The Norwegian officials are accused of advising and assisting a Norwegian citizen and her children in leaving the United States. There can be no doubt the officials here were exercising discretion.
>
> Moreover, each of the acts alleged by appellant are within those expressly within the function of consular officials according to the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77 ("VCCR"). Article 5, sections (d) and (e) of that document, to which the United States and Norway are signatories, defines consular functions in part as "issuing passports and travel documents to nationals, both individuals and bodies corporate, of the sending state." Acts covered by the VCCR presumptively are "grounded in social, economic, and political policy" and thus the conduct of the Norwegian officials satisfies the second prong of the discretion-

ary function analysis contained in Liu. (Appendix to Petition, p. 5A; 936 F.2d at 395-396)

6. Petitioner's Contention That The Discretionary Function Exception To The Noncommercial Tort Exception To Foreign Sovereign Immunity Does Not Apply In This Case Because Consular Officers Halvorsen And Solli Allegedly Participated In The Commission Of A Crime Under California Law Is Without Merit.

Norway does not understand petitioner to contend that the functions performed by consular officers Halvorsen and Solli *were not in fact discretionary functions* within the meaning of 28 U.S.C. § 1605(A). Instead, petitioner contends that (1) their conduct violated California Penal Code Section 278.5.[17] and (2) the discretionary function

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[17]The alleged conduct of consular officers Halvorsen and Solli in 1984 did not in fact violate California Penal Code § 278.5(a), which applies to a person who "... in violation of the physical custody or visitation ... order ... *takes* ... *the child* with the intent to deprive another person of his ... rights to physical custody or visitation." (Emphasis added.) It is not alleged that either Halvorsen or Solli took the Risk children from San Francisco Bay Area or to Norway. Nor did their alleged conduct violate California Penal Code § 278.5(b), which proscribes certain conduct by a person "*who has a right to physical custody of or visitation with a child.*" (Emphasis added.) The most that the complaint could be contended to allege is that the described acts of Halvorsen and Solli are criminal because they aided and abetted Elisabeth Risk's violation of Penal Code § 278.5 in returning to Norway with the Risk children. However, the complaint falls short of doing so because it does *not* allege that either Halvorsen or Solli was aware of Penal Code § 278.5 or that his assistance or advice to Elisabeth Risk might violate that statute. For example, with respect to Vice-Consul Halvorsen, all that is alleged is that defendant Sandvin "... informed Halvorsen of the pending custody case and of the specific prohibitions on travel contained in

exception does not apply to acts of a consular officer which violate the criminal law of the state wherein acts occur.[18] The courts below correctly rejected petitioner's contention that the alleged criminality of the discretionary policy decisions made by Halvorsen and Solli automatically made § 1605(a)(5) applicable and subsection (A) thereof inapplicable in this case.

The district court said (1) "[t]hat those decisions may conflict with decisions made by a California court does not render them any less entitled to the immunity under the FSIA" and (2) that "... attaching the label of kidnapping to the conduct at issue is not sufficient to overcome the policy attributes of Norway's decision to aid its nationals in conformity with its own laws, regardless of the resulting conflict with California law" (707 F. Supp. at pp. 1166-1167). In so ruling, the district court recognized both that a different conclusion might be reached concerning other conduct of foreign consular officers in other circumstances and that "[d]rawing the line between immune and non-immune acts violating the law of another state will rarely be an easy task" (707 F. Supp. at 1166).

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the January 30th order of the San Francisco Superior Court." (Complaint, para. 17, p. 7, lines 4-9.)

[18]In support of this assertion, petitioner cites cases which purportedly hold that criminal acts do not fall within the discretionary function exception to the Federal Tort Claims Act. (Petition, p. 10). However, the cited cases do not so hold, but instead decide only that conduct which exceeds a federal official's authority or which violates regulations established to govern his exercise of authority does not fall within the discretionary function exception. None of the FTCA cases addresses a situation where conduct within the scope of a federal official's authority and complying with regulations governing its exercise was alleged to violate a state criminal provision.

Petitioner mischaracterizes the court of appeals' decision as holding that a foreign state can never be liable under 28 U.S.C. § 1605(a)(5) for conduct which the foreign state authorized, and thus as "intended to leave the power to define the scope of tort liability in the hands of foreign states." (Petition, p. 12) In fact, the court below decided only that whether conduct by a foreign state falls outside the discretionary function exception if it violates the law of the receiving state depends on the facts of each individual case:

> While the Letelier court apparently considered "action that is clearly contrary to the precepts of humanity" outside the scope of the discretionary function exception, *id.*, the nature of the act in that case obviously influenced the court. In this case, the most than can be said is that Norwegian officials issued travel documents to a Norwegian citizen and her children, also citizens of Norway; that they provided funds for her travel; and that they protected her from contact by her former husband. Although these acts may constitute a crime under California law, it cannot be said that every conceivably illegal act is outside the scope of the discretionary function exception. (Appendix to Petition, p. 7A; 936 F.2d at 396)

Similarly, in its *amicus curiae* brief in the court below, the United States asserted that "plaintiff's contention that conduct that can be characterized as criminal automatically falls outside of Article 5(d) [of the Vienna Convention] must fail."

MacArthur Area Citizens Ass'n v. Republic of Peru, *supra*, 809 F.2d. 918 (D.C. Cir. 1987) necessarily decided that the discretionary function exception is not automatically made inapplicable if the conduct in question violates the receiving state's law. There, Peru purchased a build-

ing in the District of Columbia and converted it into a chancery. *Id.* at 919. Because the result was unsightly, a neighborhood association sued for damages, alleging, *inter alia,* that Peru's activities violated a criminal provision of an applicable zoning law. The district court dismissed the suit on the ground of foreign sovereign immunity, and the Court of Appeals for the District of Columbia Circuit affirmed pursuant to, *inter alia,* the FSIA's discretionary function exception.

The authorities relied upon by petitioner do not support his contention that § 1605(a)(5)(A) is inapplicable in this case. *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), held that the discretionary act exception was inapplicable because the Chinese courts had held that the foreign state had not authorized the conduct in question. Accordingly, the court did not reach the question whether the discretionary function exception is automatically inapplicable to conduct which is authorized by a foreign state but violative of the law of the receiving state. In the instant case the same court of appeals held the contrary.

Petitioner contends that *Letelier v. Republic of Chile*, 488 F.Supp. 665 (D.C. D.C. 1980) adopted a "bright line rule" that the discretionary function exception does not apply to acts of foreign states which constitute felonies under United States law. (Petition, p. 14) Although the Republic of Chile did not rely upon the discretionary function exception in *Letelier* (488 F.Supp. at 671), it was nevertheless discussed by the district court. However, the court did not announce a "bright line rule" applicable to all felonies. While the *Letelier* court did say, in passing, that there is no discretion under the FSIA for a foreign state to commit an illegal act, the holding of the case is clearly much more limited:

. . . .

> Whatever policy options may exist for a foreign country it has no "discretion" *to perpetrate conduct designed to result in the assassination of an individual or individuals*, action that is clearly contrary to the precepts of humanity as recognized in both national and international law. Accordingly there would be no "discretion" within the meaning of section 1605(a)(5)(A) *to order or to aid in an assassination* and were it to be demonstrated that a foreign state has undertaken any *such act* in this country, that foreign state could not be accorded sovereign immunity under subsection (A) for any tort claims resulting from its conduct. As a consequence, the Republic of Chile cannot claim sovereign immunity under the Foreign Sovereign Immunities Act for its alleged involvement in the deaths of Orlando Letelier and Ronni Moffitt. (488 F.Supp. at 673) (Emphasis added.)

C. Norway Has Foreign Sovereign Immunity If Petitioner's Claims Are Based On Alleged Acts Of Norwegian Officials In Norway

As stated above, the petition appears to be based primarily on alleged conduct of consular officers Halvorsen and Solli in California. However, petitioner also refers to alleged activities of other Norwegian officials acting in Norway, particularly insofar as petitioner alleges a conspiracy among all of the defendants named in the complaint. If petitioner relies on those activities, the petition should be denied. Both the legislative history of the FSIA and virtually all case law establish that the noncommercial tort exception applies *only* where the *entire* alleged tort — *i.e.*, all wrongful acts *and* injuries — occurred in the United States. Thus, the House Report said:

> [§ 1605(a)(5)] denies immunity as to claims for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state or its officials or employees, acting within the scope of their authority; *the tortious act or omission must occur within the jurisdiction of the United States*, and must not come within one of the exceptions enumerated in the second paragraph of the subsection. (Emphasis added.) [Cong. Code and Ad. News, *supra*, at 6619.]

This statement has been relied upon in many decisions upholding claims of foreign sovereign immunity because the foreign country's alleged acts or omissions did not occur within the United States. *See, e.g., Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379 (7th Cir. 1985) ("... Congress intended that the tortious act or omission, as well as the injury, occur in the United States"); *Asociacion de Reclamantes v. United Mexican States, supra*, 735 F.2d 1517 at 1524-5, (D.C. Cir. 1984); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 842 (D.C. Cir. 1984) ("... *both* the tort *and* the injury must occur in the United States" (emphasis added)); *Four Corners Helicopters, Inc. v. Turbomeca S.A.*, 677 F.Supp. 1096, 1102 (D.C. Col. 1988) ("The *entire tort* must have occurred in the United States"). (Emphasis added.)[19]

If petitioner's claims are based on alleged acts of Norwegian officials or employees in Norway, the requirement that the *entire tort* (all wrongful acts *and* resulting injury) take place in the United States is clearly not met in this case and the noncommercial tort exception to the

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[19] *Olsen by Sheldon v. Government of Mexico, supra*, 729 F.2d 641, decided by the court below, departed to a degree from this interpretation of § 1605(a)(5). The court of appeals obviously did not regard that decision to be applicable to this case.

foreign sovereign immunity granted by 28 U.S.C. § 1604 does not apply. The effect of this requirement in the instant case is threefold:

1. If petitioner is contending that the alleged conduct of Messrs. Halvorsen and Solli in California was directed by or enmeshed with the conduct of Norwegian officials in Norway, his claims against Norway do not fall within § 1605(a)(5) because elements of such a combined course of conduct did not occur within the United States.

2. For the same reason, petitioner's conspiracy claim, i.e., that all defendants participated in a common and combined course of conduct, does not fall within § 1605(a)(5).

3. If petitioner purports to state a separate claim against Norway, based solely upon the conduct of Norwegian officials acting in Norway, that claim does not meet the requirement of § 1605(a)(5) that both the alleged tortious conduct and its consequences must occur within the United States.

D. Because Larry Risk's Claims Are Time Barred By California Code of Civil Procedure § 340(3), The Petition Should Be Denied Even If The Court Of Appeals Erred In Affirming The District Court's Dismissal Of The Case As Against Norway On The Ground Of Foreign Sovereign Immunity

It is well established that "[t]he prevailing party may . . . assert in a reviewing court any grounds in support of his judgment, whether or not that ground was relied on or even considered by the trial court." *Dandridge v. Williams*, 397 U.S. 471, 475 fn.6, 90 S.Ct. 1153 (1970). *See also U.S. v. Harvis Const. Co., Inc.*, 857 F.2d 1360, 1363 (9th Cir. 1988) (statute of limitations issue may be raised

to sustain judgment on appeal despite trial court's rejection of that argument and decision on other grounds.)

California Code of Civil Procedure § 340(3) ("C.C.P. § 340(3)") requires an action "for injury to . . . one caused by the wrongful act . . . of another" to be brought within one year after the cause of action arose. Accordingly, C.C.P. § 340(3) applies to any wrongful act-which results in personal injury. 3 Witkin *California Procedure, Actions*, § 403 (3d ed. 1985). C.C.P. § 340(3) therefore bars Larry Risk's claims against Norway because the injuries he allegedly incurred in 1984 — e.g., severe emotional distress, mental and emotional injury, humiliation, pain and suffering, and intentional interference with his right to consortium with his children — are all personal injuries. *Murphy v. Allstate Ins. Co.*, 83 Cal.App.3d 38, 50, 147 Cal.Rptr. 565 (1978); *McDowell v. Union Mutual Life Ins. Co.*, 404 F.Supp. 136, 147 (C.D. Cal. 1975). In addition, C.C.P. § 340(3) applies to an action for loss of spousal consortium (*see Rodriguez v. Bethlehem Steel Corporation*, 12 Cal.3d 382, 408 n.30 (1974); *Priola v. Paulino*, 72 Cal.App.3d 380, 383 (1977)) and thus, by analogy, to an action for loss of consortium in the parent-child context — the gravamen of Larry Risk's claims for relief.

Under California law a cause of action arises when a wrongful act is done and injury thereby inflicted. 3 Witkin, *California Procedure Actions*, § 351 (3d ed. 1985), and cases cited therein. The mere allegation of a continuing wrong or continuing damages does not toll the running of the statute of limitations. *See Teitelbaum v. Borders*, 206 Cal.App.2d 634, 637-38 (1962).

This action is based on the alleged involvement of defendants in the return of the Risk children to Norway on July 16, 1984. On or about that date, the allegedly wrongful acts were done, Larry Risk's alleged injuries

(deprivation of consortium, emotional distress, etc.) were incurred, and liability, if any, arose. Mr. Risk had *one year* thereafter to file his complaint, but it was not filed until *April 19, 1988*, almost *four years* later. Consequently, Mr. Risk's cause of action based on the return of the Risk children to Norway in July, 1984, is barred by C.C.P. § 340(3).[20]

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[20]Petitioner alleges in the Second Cause of Action that "the remaining defendants, and each of them, willfully and knowingly . . . conspired with defendant Elisabeth Antonsen Risk to abduct, entice, harbor and conceal Karima Risk and Jamil Risk from plaintiff Larry Risk" (Complaint, para. 30, p. 12, lines 5-9). Larry Risk's claims are nevertheless barred by C.C.P. § 340(3). There is no separate tort of civil conspiracy under California law. 5 Witkin, *Summary of California Law Torts*, § 44 (9th ed. 1988); *Nicholson v. McClatchy Newspapers*, 177 Cal.App.3d 509, 521, 233 Cal.Rptr. 58 (1986); *Agnew v. Parks*, 172 Cal.App.2d 756, 762, 343 P.2d 118 (1959). Therefore, the applicable statute of limitations is determined by the nature of the substantive causes of action in connection with which a conspiracy is alleged. *Maheu v. CBS, Inc.*, 201 Cal.App.3d 662, 673 (1988). As discussed above, C.C.P. § 340(3) applies to all of the substantive causes of action pleaded in the complaint. Accordingly, the applicable limitations period for all of Larry Risk's causes of action against Norway is one year, even though a conspiracy is alleged.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

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